

Landlords win the Game

A Briefing Note from Wright, Johnston & Mackenzie LLP

WJM's Debt Recovery expert, Steven Docherty, comments on an English Court of Appeal decision which will have significant benefits to landlords of properties when their tenants are placed into Administration. Steven said "This decision is welcomed as it helps to balance the odds between the landlord and an Administrator when an existing tenant becomes insolvent."

Most commercial properties in Scotland are rented to their tenants on the basis of rent being payable every quarter year, in advance. So, for example, if the "quarter day" is 28 February, the rent for the following 3 months has to be paid by that date in full, or else the tenant is held to be in arrears of rent, which can ordinarily lead to the tenant being removed from the premises following a court order obtained by the landlord.



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However, what about the position when the tenant company is insolvent, and in particular, when it is placed into Administration? Administration is a process where a struggling limited company is traded by an appointed Insolvency Practitioner, one of whose tasks is to maximise the recovery of assets (whether through normal trade or a sell-off of the business or its assets), for the benefit of all of the creditors. Sometimes, to allow the best conditions for maximum recovery of assets, an Administrator will want to continue to occupy the premises which were being leased by the company.

There was a series of cases between 2009 and mid-2012, where the court had decided that, if a company is placed into Administration after a "quarter day", then the Administrators of that company are entitled to continue to occupy the leased premises for the rest of that 3 month period, without having to pay the rent. The landlord, therefore, whose tenant would likely not have paid the rent before the Administration started, would be hit by a double-whammy – they would have to put up with the Administrator staying in the premises and benefitting from them but not paying for them, while at the same time the

landlord could not eject the Administrator from the premises so as to re-let them to someone else. Administrators basically gained a 3 month rent-free period for themselves, by dint only of the timing of their appointment.

This led to considerable unfairness on landlords – their only remedy would be to lodge a claim in the Administration for the unpaid rent, but their claim would rank alongside the claims of all of the other creditors. In many Administrations, there is not enough money at the end to allow the creditors to be paid in full, so landlords would often end up only receiving pennies on the pound.

The Court of Appeal has now reversed that unfairness, in a decision involving the Administration of the Game group of companies. The Game group was placed into Administration shortly after the quarter day had arisen on many of the premises which the group was leasing, and as a result of the application of the existing rule, the Administrators refused to pay the rent to the various landlords. The landlords challenged this, and the Court of Appeal has just held that they were right to do so.

In a decision released on 24 February 2014, Lord Justice Lewison in the Court of Appeal decided that the Administrator (and also a Liquidator who is in the same position) “must make payments at the rate of the rent for the duration of any period during which he retains possession of [the premises] for the benefit of the winding up or Administration....The rent will be treated as accruing from day to day. Those payments are payable as expenses of the winding up or Administration.”

For the Administrators of the Game group, this decision is estimated to mean that they will have to pay some £3million to the landlords in question, although the decision may well be appealed to the Supreme Court.

The general effect of the decision as it stands is that, if an Administrator or Liquidator wants to continue to use premises for the purpose of the insolvency process and while it is continuing, they will have to pay rent to the landlords of those premises for the period of their occupation, and that rent will be payable in preference to the claims of other creditors. It is thought that the effect of the decision may also be to allow landlords whose claims in current Administrations or Liquidations had been rejected on the basis of the previous court judgements, to resurrect their claims.

Landlords will no longer have to simply bear the brunt of the continued occupation of their premises, and to that extent, they can therefore be said to have “won the Game”.

WJM has significant expertise in Debt Recovery, especially in insolvency situations. Graham Bell who is a Law Society of Scotland accredited expert in Insolvency works closely with Steven's Debt Recovery team to secure the best possible position for all involved.

If you find yourself in a similar situation, contacting us could be a game-changing move.

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